# IN THE HIGH COURT OF BOMBAY AT GOA

## CRIMINAL REVISION APPLICATION NO. 21 OF 2006

Shri Laxman alias Bala Govekar,
r/o. H. No. 181, Behind Hotel,
Raviraj, Chinchalwada,MArgao,Goa. ..... Petitioner

*V e r s u s*

1. Mr. Janardhan S. Kalangutkar,
   S/o. Late Sakaram Kalangutkar, aged
   about 76 years, retired teacher, residing
   at H. No. 178/B, Chinchalwada,
   Margao, Goa, (Applicant No. 2 before
   the Trial Court).

2. Satchit Bhimrao Kerkar,
   r/o. H.No. 180,

3. Sadanand B. Kerkar,
   r/o. H. No.180,

4. Ashok N. Khandekar,
   r/o. H.No. 190,

5. Shripad Govekar,
   r/o. H.No.179,

6. Vithal Govekar,
   r/o. H. No. 179,

7. Parashuram Salgaonkar,
   r/o. H.No. 176,

8. Kum. Sunanda Govekar,
   r/o. H. No. 181,

9. Smt. Jayashree Govekar,
r/o. H. No. 181,

10. Shri Damodar Kaskar,
r/o. H. No. 174,

11. Shri Deepak Kaskar,
r/o. H.No. 174
All r/o. Chinchalwada,
Behind Hotel Raviraj,
Margao, Goa (All Opponents
before the Trial Court)

12. Shri Vithal S. Arondekar,
of major age, residing at
H.No. 178/A, Chinchalwada,
Behind Hotel Raviraj, Margao,
Goa(Applicant No.1 before the
Trial Court)

13. S T A T E (Represented by
Margao Town Police Station)
(Complainant before the Trial
Court)
(Above all are the Regd. Addresses) ..... Respondents

Mr. Nitin Sardessai, Advocate for the Petitioner.

Mr. S. Usgaonkar, Advocate for Respondent no.1.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent no.13.

CORAM: N. A. BRITTO, J.

DATE: 8th September, 2006.

**J U D G M E N T**

This revision petition is directed against the Order dated 27.04.2006 of the learned Sessions Judge, Margao, by which, the learned Sessions Judge, set aside the Order dated 05.12.2003 of the learned Executive Magistrate, Margao, dropping the proceedings initiated by him under Section 133 of the Code of Criminal Procedure, 1973. ('*Code*' for short).

2. The petitioner herein was respondent no.1 before the learned Executive Magistrate. The respondents nos. 1 and 12, the former being the nephew of the latter, were the applicants (said respondents, for short), at whose instance the said proceedings were initiated by the Executive Magistrate.

3. The dispute between the petitioner and the said respondents is as regards a right of way. The petitioner and the contesting respondent no.1 having failed to arrive at a compromise, this revision petition has been heard on merits. At the time of hearing, a plan of the locality has been produced and regarding which, there is no dispute raised. The petitioner as

well as the said respondent nos. 1 and 12 have their house in the property of one Smt. Ana Clara Figueiredo de Albuquerque de Souza and they have been residing therein as Mundkars. It appears that the said respondents have already been declared as Mundkars while the declaration sought by the said Petitioner is on the way. The petitioner had his original house which has been shown by letters GH on the said plan and he has extended the same as shown by letters GE on the said plan. This house is on the eastern side of the said way. The said respondents had their house which has been shown by letters A & K and they too extended the same and the extensions have been shown by letters 'a' and 'k' on the said plan. This house is on the western side of the way. The petitioner has constructed a W.C. and it has been shown by letter G. Likewise, the said respondents have constructed a W.C. and the same has been shown by letter A-1. The obstruction whose height was differently stated by different witnesses, has now been shown on the said plan as a pavement 30 cms above from ground level and it can be also seen on one of the photographs produced along with the said plan. The way or the passage claimed by the said respondents has been shown on the said plan as having a width of 67 cms in between the extension of the house of the petitioner (GE) and the toilet/W.C of the petitioner.

4. The said respondents filed separate applications dated 07.02.2001 complaining that they were declared to be the Mundkars of their house by Order dated 30.08.1989 and that there existed a traditional footpath/pathway/access/passage, which was the only access leading to their house from the main road and that they had no other access or pathway available to them and that on or about 04.02.2001, the said passage/pathway, leading to their house, came to be blocked by the petitioner and other respondents (except respondent nos. 6 and 13), by dumping rubble stones and mud thereby raising its height by one metre in order to cause nuisance and obstruction to the said respondents and that due to the said blockage, it had become extremely difficult for respondent no.12, who was 75 years old to cross over the said blockade, and due to which, they could not bring any vehicle which had to be parked on the road.

5. Pursuant to the said applications dated 07.02.2001, filed by respondent nos. 1 and 12, the learned Executive Magistrate called for a report from the Margao Town Police Station and after the said report dated 23.02.2001 was submitted, the learned Executive Magistrate issued a conditional Order and called upon the petitioner and others to show cause,

and in reply thereto, the petitioner and others filed a reply dated 03.04.2001. In the said reply, the petitioner and others stated that there had been a traditional access being used by them to go to the public toilet and also to the nearby public road from their respective residences. They also stated that the families of respondent nos. 1 and 12 (Kalangutkar and Arondekar) had extended their house and had blocked the traditional access and their construction was illegal. The petitioner and others stated that no blockade was done by any of them and that the said respondents (respondent nos. 1 and 12), had made a false complaint against them and also a false police report made against them.

6. In the inquiry which followed, several witnesses were examined, and by Order dated 05.12.2003, the learned Executive Magistrate was pleased to drop the proceedings, inter alia, concluding that the respondent nos. 1 and 12 had failed to prove that the passage was public and that the said respondents had also failed to prove by evidence its length and width.

7. The learned Sessions Judge, in revision filed by respondent no.1 alone, came to the conclusion that the learned Executive Magistrate

had recorded a clear finding that there has been a blockade of the suit access and at the same time, the learned Executive Magistrate had also recorded another finding that the suit access was not a public access as it was used only by two families, which finding, according to the learned Sessions Judge, was arbitrary and perverse and the fact that the said access was used only by two families was not sufficient to hold that it was a private access. These findings of the learned Sessions Judge have been assailed in this revision petition.

8. At the outset, it must be observed that even if the Order dated 27.04.2006 of the learned Sessions Judge is allowed to stand and is implemented and executed, what can be removed is only the said platform which is only 30 cms in height, as depicted in the plan. However, the toilet of the petitioner marked G on the plan, cannot be touched and so also the toilet of respondent nos. 1 and 12, marked A1, which also come on the way of the way claimed by the said respondents. It is submitted on behalf of the respondent no.1 by his learned Counsel Shri Usgaonkar, that the said toilet, marked G, was constructed in the course of the proceedings, a submission which is not at all borne out by the records and otherwise also it is difficult to accept that the respondents would have remained quiet if the gap of their

passage was reduced to just 67 cms by construction of the said W.C. marked by letter G. It does appear that the land belonging to the said said landlady of the petitioner on one hand and the said respondents on the other hand, has been freely used by them for extension of their houses and/or for the construction of their toilets and the space or way which was earlier used by them came to be reduced only to 67 cms. This is also evident from the evidence of respondent no.1, who had stated that the width of the access was three metres and at present the same was reduced due to the encroachments by the houses on either side of the access.

9. Be that as it may, Shri Sardessai, the learned Counsel on behalf of the petitioner has submitted that in the applications dated 07.02.2001, filed by the said respondents, there was no allegation that the access to go to their house was a public access or the public had a right to use the same. Shri Sardessai has submitted that the said respondents had to plead that the access claimed by them was a public access or in any event, the public had a right to use the same, in order to give jurisdiction to the learned Executive Magistrate to initiate the proceedings under Section 133 of the Code and in the absence of any such averments in the said applications, the learned Executive Magistrate could not have assumed jurisdiction and

issued a conditional Order. Shri Sardessai has submitted that the said respondents were agitating a private right and not a public right and the same could not have been within the scope of the provisions of Section 133 and the remedy, if any, of the said respondents was by way of a Civil Suit. Learned Advocate Shri Sardessai has placed reliance on the decisions reported in ***1983 Mh.L.J. 676*** and ***1968 Mh.L.J. 909***. Shri Sardessai has further submitted that the learned Sessions Judge has wrongly held that the learned Executive Magistrate had recorded a clear finding that there was blockade to the suit access when in fact there was no such finding recorded. It is also submitted that the learned Sessions Judge wrongly applied the ratio of the case of ***Ram Lal & anr. v. Dharam Vir (2001 Cri.L.J. 4507)***, to the facts of the case since that Judgment dealt with a public way. Shri Sardessai has also submitted that it was incumbent upon the learned Sessions Judge to have discussed the evidence led in the inquiry in case the learned Sessions Judge wanted to come to a finding contrary to the one arrived at by the learned Executive Magistrate in as much as the learned Sessions Judge has also not clearly stated where the Executive Magistrate went wrong in ordering the dropping of proceedings. Shri Sardessai has further submitted that a tradition as claimed by the said respondents could as well be a private tradition and not a public tradition. It is submitted by

Shri Sardessai that no evidence de-hors the averments in the said applications of the said respondents could have been looked into.

On the other hand, Shri Usgaonkar, the learned Counsel on behalf of respondent no.1, has submitted that the petitioner and others had admitted in their said reply that the said way was traditional and that is because everyone was using the same. Shri Usgaonkar has submitted that since the said way was used by all, it had a public character and in fact the reply filed by the petitioner and others, supported the case of the said respondents. As per Shri Usgaonkar, the Order of the learned Sessions Judge needs no interference though learned Advocate Shri Usgaonkar concedes that there will be problem as regards its execution of the Order of the learned Sessions Judge, as already pointed out herein above.

10. Section 133 appears in Chapter 10 of the Code, in a part dealing with public nuisances and deals with several matters connected with public rights and one of them being the removal of obstruction or nuisance from any public place or from any way which is lawfully used by the public. The relevant portion of Section 133, relevant only to decide the facts of this case, would read as follows:-

> "Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-
> (a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or
> ...
> Such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance ...
> (i) to remove such obstruction or nuisance; or
> ...
> If he objects so to do to appear himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the Order should not be made absolute."

The explanation below sub-section (2) of Section 133 explains what a public place is and it defines a public place so as to include also property belonging to the State, Camping grounds and grounds left unoccupied for

sanitary or recreative purposes.

11. The learned Executive Magistrate was certainly required to give a clear cut finding first as to the existence of a public place or a way which is or may be lawfully used by the public and second as regards its obstruction or nuisance. The learned Counsel on behalf of both the parties have referred to the relevant portion of the Order of the learned Executive Magistrate, which reads thus:

> "It is clear that there has been blockade to the suit access from the statement of informant. However, memorandum drawn by Court and statement of opponent states that there is no obstruction to access..." "....Every access is not a public access. In present case, access is used only by two families and that also staying in different portion of same house as stated by I.O., therefore, it is not a public access."

From the above it can be said that there was a clear finding given by the learned Executive Magistrate that the access claimed by the said respondents was not a public access. As to the finding as regards

obstructions, there was no definite finding given by him. In a situation like this, it was incumbent upon the learned Sessions Judge to have discussed the evidence produced by the parties and come to his own conclusion whether the way claimed was a public access and next whether there was an obstruction created over it. As already stated, there was no clear finding at all that the access was blocked as otherwise noted by the learned Sessions. The learned Sessions Judge has not assigned any reasons as to why the finding of the learned Executive Magistrate, that the suit access was not a public access, was arbitrary or perverse. It is expected that when a Court reverses the findings given that it must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This is required to satisfy the Court hearing a further appeal or revision to ensure that the Court of Appeal or Revision had discharged the duty expected of it. This does not appear to have been done in this case by the learned Sessions Judge.

12. In the case of ***Chatrapati Shivaji Co-operative Housing Society v. The State of Maharashtra (1968 Mh. L. J. 909)***, a Division Bench of this Court had observed that (1) the power under Section 133 of the Code is exercisable if there is an unlawful obstruction or nuisance on

any way, river or channel which is lawfully used by the public; (2) if there is any unlawful obstruction or nuisance in any public place. The wording clearly postulates that the obstruction or nuisance is on any way, river or channel which is used by the public which means that the public must have a right of way which is being obstructed or on which nuisance is made, or it must be a public place where any of these things are done. In the case of ***Sudhakar Vithalrao Welankiwar v. Liberty Services and others (1983 Mh. L. J. 676)***, this Court held that where nothing is specifically stated in the application to invoke jurisdiction in Section 133 (1)(d), it is clear that the Sub-Divisional Magistrate will not get any jurisdiction at all to pass the preliminary order under Section 133(1)(d). It was also held that where nothing specifically is stated in the application itself spelling out a case of public nuisance it is clear that the Sub-Divisional Magistrate would not get any jurisdiction at all to pass a preliminary order under Section 133(1)(d) of the Code.

13. The case of ***Ram Lal & anr. v. Dharam Vir (2001 Cri.L.J. 4507)***, on which reliance was placed by the learned Sessions Judge, was a case where the conditional Order was made based on reports of the police and revenue authorities as well as the admissions in earlier litigations which

showed the existence of a public passage before the obstruction was put upon it and it is in that context that the learned Single Judge of the Delhi High Court had observed that Section 133 of the Code provided summary remedy for removal of specific public nuisance or obstructions and that it was not intended to settle private dispute between the two members of the public. It was further held that the proceedings under that Section do not affect the right of the public to approach a Civil Court for determining the question of title and that the Magistrate's jurisdiction could be invoked even by a private individual despite availability of an alternative remedy. It was also observed that the encroachment of the public road, however small, would inevitably result in obstruction to the persons who may have the occasion to use the same and the expression "*which is or may be lawfully used by the public*" clearly shows that all that is required to be shown is that the land in dispute is the public way etc. which can be lawfully used by the public. Referring to the expression "*public way*", it was observed that the said expression was not defined in the Code or in the Penal Code and that public way is a place where a public has a right to go or to which the public can have access by way of right either by admission, usage or otherwise and it is not necessary that the title of the place should be in the public. It would depend upon the character of the place and the usage actually made

of it in the past or at a given point of time, which can be determined only after proper adjudication.

14. In the case at hand, the said respondents are Mundkars of a house consisting of two parts in the property of the said Smt. Matilda Figueiredo, in which the petitioner also has his own house. As already seen, the said respondents had claimed a pathway/passage as traditional access leading to their house. The sum and substance of the claim made by them in their said applications was that the pathway/passage leading to their house was obstructed i.e. a private passage. The word '*traditional*' as per Concise Oxford Dictionary (Ninth Edition) means *based on, or obtained by tradition*. The word '*tradition*' means *a custom, opinion, or belief handed down to posterity esp. orally or by practice.* **b** *this process of handing down, etc*. In other words, what the respondents had claimed was that their traditional way to come to their house was blocked and there was no public right involved in it. In other words, it was the way to their house which was blocked and not a public way or the way which could be lawfully used by the public. Although the said applications were sent for inquiry and report to the Police Station, the Police report also did not indicate that the said way claimed by the said respondents was a public way or a way which the

public was entitled to use and it also reiterated the claim of the said respondents that the pathway claimed by the respondents was a traditional pathway and they had no other access or pathway and on account of the obstruction, a great inconvenience was being caused to the family of the said respondents and certainly not to any members of the public. The conditional Order was also silent as regards obstructions of any public way and what it referred to was to the pathway of the said respondents. The reply filed subsequently by the petitioner and others, could not have helped the learned Executive Magistrate to give jurisdiction for he could have assumed jurisdiction only based either on the averments in the said original application of the said respondents or the police report which was called for and both the said applications and the report were conspicuously silent as to whether the obstruction was on a public way or a way which could be lawfully used by the public and in the absence of any such averments in the said applications/report, the learned Executive Magistrate could not at all have exercised his jurisdiction to initiate the proceedings. It also may be noted that upon completion of inquiry, the learned Executive Magistrate had come to a right conclusion that the access claimed by the said respondents was not a public access. If the said respondents had claimed the said access as a private access leading to their house, certainly it could

not be a public access. The access leading to one house, as claimed by the said respondents, could by no stretch of imagination be termed as public way or a way to which may be lawfully used by the public. The case at hand was a clear case where the said respondents were agitating a traditional private right to go to their house and not a case of obstruction of a public access or a way which could be used by the public. In the absence of any such averments either in the applications of the said respondents or the police report subsequently called for, the learned Executive Magistrate had no jurisdiction to entertain a private dispute between the said respondents on one hand and the petitioner and other respondents on the other hand. The dispute between both the parties was a private dispute and to settle such a dispute, the provisions of 133 could not have been invoked. The dispute raised by the said respondents as against the petitioner and others was in the nature of a private dispute and it could be enforced by an action in a Civil Court. The provisions of Section 133(1)(a) are not meant to settle private rights which have no public character. Section 133 of the Code can be resorted to only in the interest of public and cannot be made a substitute for litigation in Civil Courts in order to secure settlement of private disputes which do not affect the members of the public in general. The said respondents have been agitating a right for access to their house

through the property of Bhatkar, which was obstructed by the petitioner and others and, in such a situation, their remedy was elsewhere and certainly not in proceedings under Section 133 of the Code. Unless it was alleged that the obstruction was on a public way or over a way which may be lawfully used by the public, the learned Executive Magistrate, had no jurisdiction of entertaining any proceedings under Section 133 of the Code. The averments in the reply filed by the petitioner and others could in no way assist the case of the said respondents for the respondents claimed a way to their house (from north to their house) and what the petitioner and others stated was that they had a traditional access to go to the public toilet from their respective residences i.e. to go towards the South.

15. The learned Executive Magistrate has rightly dropped the proceedings though, may be, for different reasons. The said respondents had claimed a private access and the learned Sessions Judge without discussing as to how a private access claimed by them could become a public access, was not justified in reversing the finding of the learned Executive Magistrate. Consequently, the revision is allowed and the Order

of the learned Sessions Judge dated 27.04.2006, is hereby set aside with no order as to costs.

N. A. BRITTO, J.

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